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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON CHRISTOPHER CRUZ,

Defendant and Appellant.

D055497

(Super. Ct. No. RIF119957)

APPEAL from a judgment of the Superior Court of Riverside County, Jeffrey J. Prevost, Judge. Affirmed.

I.

INTRODUCTION

Defendant Jason Cruz appeals from his judgment of conviction for second degree murder (Pen. Code,¹ § 187, subd. (a) (count 1)); assault on a child resulting in death (§ 273ab, subds. (a) and (b) (count 2)); child abuse (§ 273a, subd.(a) (count 5)); and

¹ Further statutory references are to the Penal Code unless otherwise indicated.

injury to a child (§ 273d, subd. (a) (count 7)).² The charges stemmed from an incident that occurred on October 20, 2004, while Cruz was babysitting his girlfriend's three children. After being left alone with Cruz for a few hours, the girlfriend's 10-month-old daughter was rushed to the hospital with severe head trauma. She died 11 days later, on October 31, 2004.

On appeal, Cruz contends that (1) the trial court abused its discretion in allowing the prosecutor to introduce rebuttal evidence; (2) the court committed error in denying his requests for a mistrial based on juror misconduct; (3) the court abused its discretion in denying his motion for a new trial on either of two grounds (i.e., newly discovered evidence and/or one particular juror's alleged misconduct); and (4) the cumulative effect of all of these errors requires reversal.

We conclude that even if the trial court did abuse its discretion in allowing the prosecutor to introduce rebuttal evidence, this evidence did not prejudice Cruz because the evidence of Cruz's guilt was overwhelming and the rebuttal evidence was of limited evidentiary value. We further conclude that the trial court did not err in denying a mistrial based on juror misconduct, and did not abuse its discretion in denying Cruz's motion for a new trial on the grounds of juror misconduct and/or newly discovered evidence. Finally, we reject Cruz's contention that cumulative error requires reversal. We therefore affirm the judgment of the trial court.

² In convicting Cruz on counts 5 and 7, the jury also found true the allegations that Cruz personally inflicted great bodily injury on a child under the age of five (§§ 12022.7, subd.(d), 1192.7, subd. (c)(8).)

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The prosecution's case*

In October 2004, 10-month-old Alanna Villarreal lived with her mother Amanda Stephenson and her four-year-old half brother and two-year-old half sister, in Amanda's grandparents' home in Riverside. Amanda's sister, Angela King, her husband Johnathan King, and their two children also lived in the home.

Amanda and Alanna's father, Micah Villarreal, had separated shortly after Alanna was born. Micah moved in with his father and stepmother after he and Amanda separated. He had visitation rights, and he and Amanda were on good terms regarding visitation.

Alanna, like Amanda's other children, had a larger than average head. However, a pediatric neurologist who evaluated Alanna on September 2, 2004, found that her development was normal and that she suffered from no neurological impairment.

On September 23, 2004, Amanda left her children with Cruz, her boyfriend of approximately a month, for an hour and a half. When Amanda returned, Alanna was whimpering. Amanda took Alanna to see a doctor the following day because Alanna had not raised her left arm in two or three days. Alanna was found to have a broken radius — a bone in the forearm. Her arm was placed in a cast. If the treating physician had been aware that Amanda had left Alanna with her boyfriend for a few hours and upon

returning found that Alanna seemed to be favoring one wrist, the physician would have been concerned about the possibility of child abuse.

Micah's stepmother, Tracy Villarreal, saw Alanna on October 16, 17, 18 and 19. Alanna appeared to Tracy Villarreal to be a "normal baby," who was "[v]ery happy and loving." Alanna was not yet talking, but she "babbled" and exhibited excitement. She could pick up some pieces of cereal and feed herself. During that time, Tracy Villarreal observed that Alanna had a "great appetite" and that she did not appear to be having any problem moving her legs, was not vomiting, and was not lethargic, groggy, or suffering from seizures.

During the daytime on October 20, Amanda's sister babysat Amanda's children. Alanna was playing and laughing normally. Amanda's grandfather, who was home that day, did not see Alanna vomiting, and she did not appear to him to be ill. Amanda's grandmother also saw Alanna on October 20, and did not notice anything wrong with her.

On the evening of October 20, Amanda left her grandparents' home to go to work at a Target department store. Amanda was scheduled to work from 6:00 p.m. to midnight. She dropped off her children with Cruz at his apartment in Corona. Cruz's apartment had two stories.

When Amanda left for work that evening, Alanna was behaving normally. Amanda called Cruz at least three times that evening. During the first call, at about 7:00 p.m., Cruz told Amanda that everything was fine, and Amanda could hear laughing in the background. At around 8:30 or 9:00 p.m., Cruz informed Amanda that Alanna had thrown-up on the couch and that he had to get off the telephone to clean it up. Cruz then

called Amanda and told her that while he was running up the stairs with Alanna, he had tripped and fallen, and that Alanna had bumped her head. Cruz told Amanda that Alanna's breathing was "weird" and that her eyes were rolling back in her head. Amanda told Cruz that the baby slept with her eyes rolled back and that he should put Alanna to bed.

Amanda returned to Cruz's apartment sometime around 12:20 a.m. on October 21. When she checked on Alanna, the baby was wearing only a diaper, and her skin was cold. Amanda turned on the light in the room and could see that something was wrong with Alanna. Alanna's face was blue and her body was discolored and pale. Amanda screamed, waking up Cruz and her other children, and called 911.

Paramedics arrived in response to Amanda's call. Paramedic Mark Bonney noticed that Alanna was limp and that she had a glassy, fixed, right-sided gaze. Her eyes were not "tracking" and she had pinpoint bruises along her left jaw line and her forehead. He recognized that Alanna was in need of immediate medical attention.

Paramedics initially transported Alanna to Corona Regional Medical Center, where she was treated by emergency room physician Dr. Kitcha Ranch. Dr. Ranch noted that the left side of Alanna's face was bruised, her right arm and leg were twitching, and she had bruises around her wrists and hands, and puncture marks and bruising on her feet. Alanna was semiconscious and non-responsive. Because the hospital was not equipped to treat Alanna's severe injuries, she was transferred to Loma Linda University Medical Center and Children's Hospital (Loma Linda).

Dr. Rebecca Piantini is a member of the Loma Linda Pediatric Department, and specializes in forensic pediatrics. Dr. Piantini is a board certified pediatrician and a member of the faculty at Loma Linda. Dr. Piantini explained the common clinical symptoms of "abusive head trauma," which is also known as "inflicted traumatic brain injury," "shaken baby," and "shaken impact syndrome." The symptoms can vary from a baby "who gets irritable," to a baby becoming "lethargic, throwing up, having seizures, stop[ping] breathing. . . . And when it's very – the worst is death immediately." Among the common clinical findings based on CT and MRI tests performed on children who are believed to have been abused are "subdural hemorrhages," which are frequently found "in between the two sides of the brain in what we call the interhemispheric fissure in there . . . a specific area where we commonly see [subdural hemorrhages] in Abusive Head Trauma." Doctors also frequently see "ischemic injuries," which are similar to strokes, in that "[t]here is not enough oxygen" in "a certain area of the brain." Retinal hemorrhages, which are caused by bleeding in the back of the eyes, behind where the retina is located, are found in "about 80 percent or more of the [Abusive Head Trauma] cases" and are "very, very, very rarely seen in other – any other cases, anything else."

What actually causes brain injury to a child is not the hemorrhage, per se, but "the disruption to the nerves, the axonal injury, the diffuse axonal injury." Diffuse axonal injury occurs when the axons, which conduct messages in the brain, break and/or get disrupted as a result of the same trauma that caused the blood vessels to shear off and create the hemorrhaging. A subdural hemorrhage is "only a marker of letting us know

what happened," or a "marker . . . that there has been some acceleration/deceleration rotational . . . [¶] . . . [¶] . . . injury."

Doctors also find bruising and/or bone fractures in babies to be significant in determining whether a child's injuries have been caused by abuse, since babies who are "not actually walking and running outside[] shouldn't have any bruises," and are not likely to have fractures.

One would not expect to see the "constellation of clinical findings" that Dr. Piantini described in relation to abusive head trauma in a situation in which a child "was bounced on a knee," or who "rolls off a couch" or "falls down a few steps."

Alanna had extensive bruising on her face and head, and a scab or abrasion on her forehead. The bruising on the left side of Alanna's face covered the skin from her ear to under her jaw, and there was additional bruising on the right side of her face. She was also bruised on her gums, the inside of her lips, her abdomen, right arm, left thigh, groin, labia, buttocks, and feet. There appeared to be a hand print on Alanna's buttocks.

Dr. Piantini suspected that Alanna had suffered abuse because her injuries were not a common result of the type of accident that might occur with a 10-month-old child. In particular, Dr. Piantini thought that the bruises on Alana's ears and face, and the handprint on her buttocks, were particularly indicative of abuse. Dr. Piantini observed that such injuries are almost always caused by abuse.

Alanna suffered severe retinal hemorrhaging in both eyes. One of Alanna's eyes showed "retinal folds," which are consistent with abusive head trauma.

With these injuries, Alanna would not have appeared normal, and she would not have been able to eat or play. Alanna would have exhibited symptoms such as vomiting and loss of consciousness immediately after suffering the injuries. Alanna's injuries were not consistent with a short fall down five or six steps, or with other accidental trauma, but instead, were consistent with abuse.

Dr. Stephen Ashwal is the chief of the "pediatric neurology service" at Loma Linda. He treated Alanna several days after she was admitted. When Dr. Ashwal examined Alanna, she was "severely neurologically impaired," as was evident by her unresponsiveness and "a marked increase in tone of her extremities," or "spasticity." Alanna also exhibited opisthotonic posturing, which is "a very severe abnormality that we don't see that often anymore. . . . where the child is arching or the head is here and the feet are here, and there's a real arching of the body." This posturing is "usually a reflection of a very severe injury to the bridging veins."

Dr. Ashwal testified that his review of Alanna's MRI scan indicated that she had suffered severe brain injury. There was evidence of "ischemic brain injury to the deep areas of the brain." According to Dr. Ashwal, "There were imaging findings of fresh blood, posterior occipital subdurals. And there was also evidence of chronic previous bleeding in the frontal regions. And the brain was a little bit atrophic suggesting that there may have been previous injury."

Dr. Ashwal concluded that Alanna's injuries were caused by "some form of child abuse." According to Dr. Ashwal, "the ischemic injury that [Alanna] had on her imaging studies was – was very pronounced. And usually that's due to suffocation or

strangulation or cardiac arrest. I don't believe there was a cardiac arrest that would have been clearly documented in the medical records [*sic*]. There clearly was trauma to the brain as well, manifested by the bleeding that was acute and chronic."³

Alanna's injuries were consistent with abusive head trauma. If Alanna had survived her injuries, her prognosis would have been "extremely poor for any recovery." She might have ended up in a "minimally conscious state," or been "profoundly developmentally delayed with severe cerebral palsy and probably blind and no language, no ability to roll over, no sitting, no walking, no talking. Nothing."

Dr. Michael Rauser is an ophthalmologist at Loma Linda who examined Alanna. Dr. Rauser explained that retinal hemorrhaging is bleeding in the back lining of the eye wall. According to Dr. Rauser, severe shaking and the back and forth movement of the brain and eyes in children under two years of age lead to retinal bleeding, because children that age have very weak blood vessels. The term "retinal folds" describes a condition in which the retina folds over and bunches up. When observed with retinal hemorrhaging, retinal folds are a specific finding for child abuse. Alanna suffered severe retinal hemorrhaging and exhibited retinal folds. The severity of Alanna's retinal

³ Dr. Ashwal could not give an approximate age of the chronic subdural hematomas that he noted on Alanna's MRI. However, according to Dr. Ashwal, the ischemic injury that Alanna suffered was the result of an acute injury, not a chronic injury. He further opined that "the fresh bleeding that was there would not be due to a rebleeding on top of an old bleed. I think that's really from significant shaking or trauma. And in the area where there was previous bleeding[,] which is the area that you would expect rebleeding, there was no rebleeding."

hemorrhaging was indicative of the extent of trauma that she had suffered. Alanna's case was one of the most severe that Dr. Rauser had ever seen.

Dr. Frank Sheridan performed an autopsy on Alanna on November 1. He observed bruising on her face—around her eyes on her cheek—and a fracture of her right leg. He noted that Alanna's brain was swollen, and that she had a subdural hematoma and hemorrhaging of the optic nerves. Dr. Sheridan further noted that Alanna's medical records indicated that she also had subarachnoid hemorrhaging.

Dr. Sheridan concluded that Alanna died of head injury resulting from abuse. According to Dr. Sheridan, the common signs of abusive head trauma are subdural hematoma, subarachnoid hemorrhage, brain swelling, retinal hemorrhage, and optic nerve hemorrhage.

Dr. Sheridan explained that swelling of the brain interferes with blood supply and respiration. When the brain suffers from inadequate oxygenation, injury to the brain cells results. Alanna suffered an injury to her brain caused by a lack of oxygen; neurological symptoms would have manifested immediately. According to Dr. Sheridan, it would not be possible for a child with the type of injuries that Alanna suffered to manifest no neurological symptoms for several days after incurring the injuries, and only later decompensate and become unconscious. Dr. Sheridan also concluded that Alanna's injuries were not the result of an "ordinary fall on a staircase," because "[t]here's not enough energy involved because the stairs — and even a fairly long flight of stairs at least has the point where the energy is absorbed partly on each step on the way down."

On the night that Alanna was taken to the hospital, while in the hospital's emergency room waiting area, Amanda's sister asked Cruz what had happened. He first told her that Alanna "just started vomiting and it just shot out." Later that night he mentioned that "he was running with the baby and that he tumbled down the stairs."

Cruz was also questioned by police at the hospital. He agreed to accompany police officers to his apartment and to reenact what had happened that night. Cruz was later taken to the police station, where he was questioned further. The jury listened to audio tapes of portions of the interrogation, and watched a videotape of Cruz's reenactment taken at his apartment.

During initial questioning by Detective Scott Currie, Cruz said that when Amanda left for work that evening, he was watching a baseball game on television and Alanna was sleeping upstairs. When the baseball game ended, Cruz put on a movie for Alanna's siblings to watch. When Alanna woke up, Cruz changed her diaper. Cruz said that he then gave Alanna a bottle, and she fell asleep on the couch. When she woke up, she vomited. Cruz attempted to clean her up. He then gave Alanna a pacifier, and she fell asleep again. According to Cruz, Alanna later woke up and her eyes "were rolling in the back of her head." That frightened Cruz, so he called Amanda. Amanda told him that it sounded like Alanna was just snoring, and to let her sleep.

As the questioning of Cruz continued, he explained that he had taken Alanna upstairs to give her a bath immediately after she vomited. Cruz initially said that he could not think of anything that could have happened that would have injured Alanna. After further questioning, particularly about the fact that Cruz had told Amanda when she

called that something had happened to Alanna, Cruz said, "Oh [G]od, when I was carrying her up the stairs, I was running up the stairs and I tripped and her head hit the wall, I forgot man, I'm not trying to hide nothing." Cruz later explained that as he was running up the stairs, he slipped and fell, and Alanna struck her head against the wall and fell down five or six concrete steps. Cruz said that he picked up Alanna, and because she did not respond, he shook her.

During the videotaped reenactment, Cruz said that Alanna had been sleeping next to him when she started gasping for air, appeared tense, and vomited on the couch. He showed police how he had run up the stairs and tripped, and how Alanna had fallen out of his arms and slid down the stairs. He said that she landed at the bottom of the stairs, face down. Alanna was unresponsive, so he shook her. Alanna's eyes were rolling back in her head and her breathing was not good. He called Amanda, and when Amanda told him that Alanna was okay, he put Alanna in her crib, where she fell asleep.

Amanda's four-year-old son, D., was present in Cruz's home at the time of the incident.⁴ D. believed that Cruz was angry because Alanna had been crying that night. D. thought that Cruz had been carrying Alanna upstairs to bed, and that Cruz had thrown Alanna down the stairs. D. did not see what happened to Alanna, but he heard noises. D. heard "six or seven bumps," like a ball bouncing on the floor, and then a "last bump." After D. heard the bumps, Alanna stopped crying. D. did not remember Alanna vomiting.

⁴ By the time of trial, D. was seven years old.

2. *The defense case*

Cruz called Dr. Janice Ophoven to testify as a defense expert. Dr. Ophoven is a forensic pathologist with special training and experience with respect to injuries in children.

Dr. Ophoven reviewed histopathology slides provided by Dr. Sheridan and concluded that there was low density fluid in Alanna's dura (the membrane between the skull and the brain). Dr. Ophoven said that this was abnormal, and "is commonly associated with fluid that accumulates after someone has suffered a previous injury" For this reason, Dr. Ophoven opined that Alanna suffered from both new and old injuries, and that she died as a result of sepsis syndrome. According to Dr. Ophoven, sepsis syndrome is an "atrophic physiologic decompensation" of different causes, with bacteria being the most common in hospital patients. When sepsis occurs, "the bottom falls out" and one "die[s] really fast."

Dr. Ophoven stated that Alanna had an abnormally large head. According to Dr. Ophoven, because Alanna had a large head and a relatively small brain, there was excess space and spinal fluid between her skull and brain. The extra fluid stretched the blood vessels that connected the dura and the brain. As a result, a relatively minor shock could result in severe bleeding that would be abnormal in a healthy brain. It was Dr. Ophoven's opinion that the size of Alanna's head contributed to her brain injuries.

Dr. Ophoven stated that the acute injuries that Alanna suffered were consistent with Cruz's reenactment in which Alanna fell down the stairs. According to Dr.

Ophoven, Alanna's preexisting brain injury left her at an increased risk for new bleeding and for an acute hematoma.

3. *Rebuttal*

The prosecutor called Dr. Alexander Zouros as a rebuttal witness. Dr. Zouros is a pediatric neurosurgeon and an assistant professor at Loma Linda. He had consulted on Alanna's case to determine whether surgical intervention was required. Dr. Zouros had examined Alanna and reviewed her imaging studies such as CT and MRI scans. Before testifying, Dr. Zouros also reviewed the testimony of Dr. Ophoven, Dr. Ashwal, Dr. Sheridan, and Dr. Piantini, as well as the autopsy report and Dr. Ophoven's summary report.

Dr. Zouros stated that in his opinion, an autopsy is the "gold standard" for judging whether a hematoma is fresh or acute, as opposed to chronic. Although an MRI may be a good indicator, it is not 100 percent accurate. Dr. Zouros opined that there are serious questions as to how well one can diagnose acute versus chronic hematomas in the subdural area based solely on imaging studies.

According to Dr. Zouros, once a diffuse axonal injury occurs, there is an immediate and profound change in the responsiveness of the victim. The patient may suffer partial paralysis or vomiting, and may be left in a comatose state or rendered severely lethargic. He also opined that a chronic subdural hematoma could not account for Alanna's traumatic diffuse axonal injury or retinal hemorrhaging, nor for the volume of subarachnoid blood that was present in Alanna's spine. Dr. Zouros also noted that when vision impairment is the result of retinal hemorrhaging, the effect is immediate.

Due to the extent of Alanna's retinal hemorrhage, the impairment of her vision would have been severe. According to Dr. Zouros, the blood that was present in the subarachnoid area of Alanna's spine would have caused her significant pain.

Dr. Zouros opined that one cannot determine from an MRI how old a hemorrhage is, or "whether or not there are old and new bleeds."

B. *Procedural background*

By information filed July 5, 2005, the Riverside County District Attorney charged Cruz with murder⁵ (§ 187, subd. (a) (count 1)); assault on a child resulting in death (§ 273ab (count 2)); torture (§ 206 (count 3)); two counts of child abuse or endangerment (§ 273a, subd. (a) (counts 4 and 5)); and two counts of infliction of corporal injury on a child (§ 273d, subd. (a) (counts 6 and 7)). The information also alleged that Cruz personally inflicted great bodily injury on a child under age five with respect to counts 4 through 7.

Trial began on February 26, 2007. The prosecution presented evidence over 10 days; the defense's only witness was Dr. Ophoven. The jury began deliberating on April 10, 2007.

On April 18, the jury foreperson sent the court a note indicating that the jury had reached a verdict on six of the seven counts, but that the jury was at an impasse on the one remaining charge. The court questioned the jurors in open court, and all 12 jurors agreed that the remaining charge could not be resolved. Despite defense counsel's

⁵ Before the jury was instructed, the prosecutor amended the information to delete the word "premeditation," and proceeded on a theory of second-degree murder.

objection, the trial court instructed the jury to continue to deliberate and sent the panel out again.

Later that afternoon, the jury returned verdicts on all seven counts. The jury found Cruz guilty of second degree murder (count 1), assault on a child resulting in death (count 2), child abuse or endangerment (count 5), and infliction of corporal injury on a child (count 7). The jury also found true the allegations that Cruz personally inflicted great bodily injury on a child under the age of five, with respect to counts 5 and 7. The jury found Cruz not guilty of torture (count 3), child abuse or endangerment as charged in count 4, and infliction of corporal injury on a child, as charged in count 6.

On May 23, 2007, defense counsel filed a motion for new trial. The trial court heard oral argument on August 9, and on October 19, the court issued an order denying the motion.

On January 11, 2008, defense counsel filed a motion requesting that the court reconsider its ruling on the motion for new trial. The trial court denied the request that same day and proceeded to sentence Cruz. The court designated count 2 as the principal term and imposed an indeterminate sentence of 25 years to life. The court stayed Cruz's sentences on counts 1, 5, and 7 pursuant to section 654. Cruz filed a notice of appeal that day.

III.

DISCUSSION

A. *Even if the court abused its discretion in admitting Dr. Zouros's rebuttal testimony, the testimony was harmless under the circumstances*

1. *Additional background*

On April 3, 2007, after Dr. Ophoven testified, the prosecutor indicated to the court that she wanted to call Dr. Zouros as a rebuttal witness to refute Dr. Ophoven's opinion that Alanna had suffered from a chronic subdural hematoma. Defense counsel strenuously objected to Dr. Zouros testifying in rebuttal. The attorneys engaged in a lengthy argument about the propriety of allowing the prosecutor to present the proposed rebuttal testimony.

Defense counsel argued that the proposed rebuttal testimony was improper because it would "open[] up new areas." Counsel also contended that allowing the prosecutor to present this testimony would be far more prejudicial than probative. According to defense counsel, the proposed rebuttal testimony would raise new issues, and the defense would be obligated to present surrebuttal testimony, which would be very difficult to arrange on such short notice. Defense counsel further noted that the prosecutor had not previously identified Dr. Zouros as an expert who it intended to call as a witness at trial.

Two days later, defense counsel indicated to the court that she had found an expert who could offer surrebuttal testimony, but that the expert would not be available to testify

until May 9. The trial court accepted defense counsel's representations on this matter, but stated that the court could not hold the trial in abeyance for a month.

The trial court ultimately concluded that Dr. Zouros's testimony would be proper impeachment of Dr. Ophoven's testimony on the issue of whether Alanna had suffered from a chronic subdural hematoma, and ruled that the prosecutor would be permitted to call Dr. Zouros as a rebuttal witness.

2. *Analysis*

"The decision to admit rebuttal evidence rests largely within the discretion of the trial court and will not be disturbed on appeal in the absence of demonstrated abuse of that discretion. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1199.) "[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." (*Ibid.*)

Cruz contends that the trial court abused its discretion in permitting the prosecutor to present Dr. Zouros's rebuttal testimony, particularly in light of the fact that the defense was unable to secure an expert to present surrebuttal testimony in time to testify at trial. We conclude that even if the trial court did abuse its discretion in allowing the

prosecution to present Dr. Zouros's rebuttal testimony, this testimony did not prejudice Cruz, under any standard of prejudice.⁶

The evidence of Cruz's guilt was overwhelming. Prior to the night of the incident, Alanna had been generally physically well and had been functioning normally. She had been laughing, playing, eating, and did not appear to have any problems with her vision or to be suffering from seizures. In addition, she did not have any of the bruising that was seen on her face, gums, lips, abdomen, right arm, left thigh, groin, labia, and/or buttocks upon her arrival at Loma Linda. Further, no one had seen puncture marks on her feet prior to that night.

Cruz provided police with a number of different versions of what had occurred, none of which explained the extent of Alanna's injuries. Further, Cruz never sought medical attention for Alanna, despite clearly knowing that she had suffered injury and that she was not breathing normally. There was abundant expert testimony that Alanna's injuries would have caused immediately apparent symptoms, such as loss of consciousness or vomiting, and that Alanna would not have appeared "normal" after suffering such injuries. Given the large quantity of evidence demonstrating that Alanna

⁶ With respect to the proper standard for assessing prejudice in this circumstance, Cruz argues that the federal constitutional standard should apply because the error is of constitutional dimension. Cruz contends that allowing rebuttal evidence when surrebuttal witnesses were not available violated his right to present a defense, and rendered his trial fundamentally unfair. Although we are not necessarily persuaded by Cruz's argument since it would appear that any presumed error is one implicating state evidentiary rules and not the federal Constitution, it is of no consequence because we would reach the same conclusion even applying the more rigorous "harmless beyond a reasonable doubt" standard as set forth in *Chapman v. California* (1967) 386 U.S. 18.

had been a relatively healthy, happy child prior to being left for a few hours in Cruz's care, and the fact that after those few hours, her body evidenced severe and extensive trauma that multiple experts opined was consistent only with child abuse, we can conclude that the admission of Dr. Zouros's rebuttal testimony was harmless beyond a reasonable doubt.

B. *The trial court did not err in denying a mistrial based on alleged juror misconduct*

1. *Additional background*

During jury deliberations on April 11, 2007, Juror 5, the foreperson, informed the court that Juror 6 had done outside research concerning the meaning of some of the terms used in the jury instructions, and wanted to share this research with the other jurors. At that point, Juror 6 had not shared the results of his independent research with the other jurors. Juror 5 also indicated to the court that Juror 6 had given Juror 5 an ambiguous note that seemed to indicate that Juror 6 had made up his mind about the case before engaging in deliberations with other jurors, but that Juror 6 wanted deliberations to continue because he wanted to continue to receive the \$15 a day in juror compensation. Juror 5 did not share the contents of Juror 6's note with other jurors. In addition, Cruz's attorney had learned that Juror 6's wife had been attending the trial and that she had attempted to talk with Amanda's grandmother during the trial.

The trial court questioned Juror 6, who admitted that he had done outside research about the meaning of a term used in the jury instructions. He informed the court that the other jurors had stopped him from telling them which word he had researched. Juror 6

also acknowledged that his wife had been attending the trial, but asserted that he had not spoken about the case with her. Regarding the note that he had given to the jury foreperson, Juror 6 said that he was attempting to tell the foreperson that he had an issue that he wanted to discuss, but that he did not want to continue to have to raise his hand in an attempt to be heard.

The court questioned the remaining jurors individually concerning whether Juror 6 had informed them about the results of his research. The jurors all said that he had not, and also stated that they would be able to continue deliberating fairly and impartially.

After concluding this questioning, the court discharged Juror 6 and replaced him with an alternate juror, with the agreement of the prosecutor and defense attorney.

During the court's questioning of the jurors, Juror 8 stated that although he would have no problem continuing to deliberate fairly and impartially, there was an issue that he "should have brought . . . up earlier." Juror 8 explained, "I have a great-granddaughter with the same name. And I have a daughter with her sister's name. Only concern I had about that, that is [*sic*] going to be a little hard to look at those pictures, any – look at my granddaughter." He informed the court that he had been able to participate in the deliberations up to that point, but that he had not asked "too many questions." When questioned further about the concerns that he had raised, Juror 8 stated, "I'm going through something similar to this, but no death."

Juror 8 said that his personal discomfort concerning the name issue had not prevented him from listening to the deliberations, nor had it caused him to "shut [him]self off." Juror 8 had looked at some of the photographs that had been introduced in evidence

and had listened to other jurors' comments about the photographs. He was prepared to share his thoughts if asked. He did not feel that he would have difficulty continuing as a deliberating juror.

Defense counsel moved for a mistrial and requested, in the alternative, that the court excuse Juror 8. The motion for a mistrial was based on defense counsel's contention that the jury had been "tainted by Juror number 6's irregularities." Specifically, defense counsel indicated a concern that because of Juror 6's conduct, the other jurors "had to bind together to sort of fight or go against him," which created "an unnatural bonding or binding together within the jury room where it should be twelve individuals coming together and trying to deliberate"

The trial court denied the motion for a mistrial, stating, "[B]ased upon the questioning of the individual jurors, . . . they have demonstrated that they do understand the Court's instructions with respect to consideration of this matter only based upon the evidence and instructions given and that it is improper to receive any information outside of what's been presented in court, and that they are conscientious in their consideration of their understanding of that admonition as demonstrated by a number of the jurors who have indicated that they clearly and positively put a stop to [Juror 6's] attempts to bring in outside information." Although the court was "a little bit concerned about the possible cumulative effect of the various incidents" involving Juror 6, the court determined that "it does not appear that any actual information was received by the remaining jurors, only that [Juror 6] proposed to bring in this outside information, [and] that they will be able to disregard those statements." The court further stated, "And while I don't dispute that

there could be potential for alignment, I think that they will continue acting in a conscientious manner and decide this case based upon their individual opinions once they have had a full chance to fully discuss the case in deliberations."

The court denied defense counsel's request to excuse Juror 8, stating: "It appears to me that he is participating in deliberations. Perhaps not as vigorously as any of us would wish. But he did express that his discomfort at having a great-granddaughter with the same name as the victim in this matter and his discomfort at viewing photographs has not prevented him from listening to and considering the views of the other jurors. He did express that he would be prepared to share his views at the appropriate time. [¶] I don't think it's incumbent upon the Court to require that each juror fully express his or her views, particularly if they don't feel as articulate as others. So it's – certainly he's not refusing to participate, and I'm not prepared to find that he's not fully participating at this time."

The following week, defense counsel informed the court that Juror 6's wife had contacted defense counsel and had left a message concerning the trial. Defense counsel had an investigator speak with Juror 6's wife. She informed the investigator that during the trial, she overheard one juror say to another juror that she did not need to hear any additional evidence because she had already made up her mind. The court questioned all of the jurors, and each denied having made this statement or having heard another juror make the statement.

During this process, the court re-interviewed Juror 8. The court asked Juror 8 to explain further what he had meant when he said that he was "'going through something

similar to this, but no death.'" Juror 8 said that the situation involved his grandson's child, Alanna, but that it did not involve abuse. Juror 8's grandson had apparently gotten into a fight with the boyfriend of the child's mother when Juror 8's wife and grandson had gone to pick up the child. Police were called, but no charges were filed. After this round of questioning, the trial court again declined to excuse Juror 8, stating, "It's clear that he is anxious about deliberating and participating, but he is voluntarily participating. Perhaps minimally, but he's not refusing to participate. And I'll find he's not doing so either expressly or implicitly. [¶] The similarity of name seems to be what bothers him more than anything else. And I think that's just peculiar, but I don't think that he's unduly personalizing any of – the victim or any other person in this matter due to that similarity."

On April 16, 2007, Juror 5 informed the court that Juror 3 had said that she had experimented with shaking her 17-month-old grandchild. When Juror 3 made this statement, a number of jurors told her to stop and indicated that they did not want to hear anything more. The jury then stopped deliberating, and Juror 5 wrote a note to the judge. The court questioned Juror 3, who admitted that she had said that she "wanted to perform an experiment," but told the court that she had not, in fact, conducted any experiment regarding shaking a baby. The court excused Juror 3 and replaced her with an alternate juror.

Defense counsel again moved for a mistrial, arguing that the cumulative effect of juror misconduct was creating a "jury that is united against a common enemy on the other side" and that the "idea that we have an independent deliberation process is really going by the wayside." The trial court denied the motion, saying, "I recognize defense concerns

that individual jurors may be surrendering their individual opinion to the group, which would be improper, I recognize. You know, this is not – this is not the fiction 'Twelve Angry Men.' This is a real life situation that is fluid. And I think the individual jurors do not – at least I haven't gotten a sense yet that they are abandoning their willingness to express their individual opinions as to the evidence." In response to defense counsel's third request to excuse Juror 8, the court repeated that Juror 8 "is not refusing to deliberate" and stated "[H]e's participating in his own way in deliberations that have been taking place so far."

On April 18, the jury foreperson wrote a note to the trial court stating that the jury had reached verdicts on six of the seven counts, but that it "has been unable to agree on one of the counts." The foreperson asked the court to confirm that "the inability to reach a decision on that one count will not . . . cause a mistrial for the entire trial." The foreperson also stated in this note that the "jury does not believe further deliberation on that one count will . . . result in a unanimous decision." After interviewing Juror 5 and conferring with both counsel, the court instructed the jury to continue deliberating.

Later that day, the jury indicated that it had reached verdicts on all counts. The jury found Cruz guilty on counts 1, 2, 5, and 7, and not guilty on the remaining counts. The jury also found true the allegation that Cruz personally inflicted great bodily injury on a child under the age of 5, with respect to both count 5 and count 7.

2. *Analysis*

a. *Juror 8 did not withhold material information during voir dire*

Cruz contends that Juror 8 concealed material information during voir dire because he "failed to mention any concerns in [the] area" of "child abuse issues." According to Cruz, Juror 8 "related mundane background information" when questioned by the court and the attorneys, and that his "silence . . . during jury selection demonstrates a lack of candor necessary for voir dire to enable the parties to select a fair and impartial jury." Cruz contends that Juror 8 should have informed the court and the attorneys that he was bothered by the fact that the victim had the same name as his great-granddaughter, and should have disclosed the fact that his grandson had been involved in a fight when he went to pick up Juror 8's great-granddaughter, and that police had been called.

We disagree with Cruz's contention that Juror 8 withheld material information. The circumstances surrounding Juror 8's grandson and great-granddaughter were not similar to the circumstances in this case. There was no allegation of child abuse in Juror 8's family situation, and there would thus be no reason for him to indicate that he had any concerns about being able to deliberate with respect to a case involving allegations of child abuse.

b. *There is no evidence that Juror 8 failed to participate in jury deliberations*

Cruz asserts that Juror 8 did not take part in jury deliberations, and that the court erred in denying defense requests to replace Juror 8 on this basis. Cruz contends that the evidence before the trial court showed that Juror 8 was unwilling or unable to participate

in deliberations, because "[a] juror who is in emotional distress, who fails to express his views or ask any questions, is a juror who is not taking part in deliberations."

A juror's refusal to deliberate is a proper ground for removing that juror from the jury. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485 (*Cleveland*).) "A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views." (*Ibid.*) "Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury." (*Ibid.*) However, the fact that a juror "does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge." (*Ibid.*)

"[I]f put on notice that a juror is not participating in deliberations," a trial court may "conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist [citation]" and may "discharge the juror if it appears as a 'demonstrable reality' that the juror is unable or unwilling to deliberate. [Citations.]" (*Cleveland, supra*, 25 Cal.4th at p. 484.)

Here it did not appear as a "'demonstrable reality'" that Juror 8 was unwilling or unable to participate in jury deliberations. Rather, the evidence supports the trial court's finding that Juror 8 was, in fact, deliberating. Specifically, when asked whether he was "still . . . deliberating," despite his personal discomfort over the similarity of names,

Juror 8 responded, "Yes." Further, when asked about whether his discomfort had prevented him "from listening to the deliberations," he replied, "No." Juror 8 also told the court that he had looked at some of the photographs and had listened to the comments of the other jurors with respect to references to the photographs. When asked whether he would be prepared to share his thoughts with the other jurors if asked, Juror 8 responded, "Yes." Juror 8 also told the court that there was nothing that would cause him to feel that he would have difficulty in continuing to sit as a deliberating juror, and said that he could sit fairly and impartially as a juror. After hearing from Juror 8, the trial court was satisfied that he was able to participate fully, and that he had not formed any opinions with respect to any issue in the case. The court concluded that Juror 8 was not refusing to participate in deliberations, and that conclusion is supported by the record.

c. *There is no evidence that Juror 8 was biased against Cruz*

Cruz contends that Juror 8 was biased against him. As evidence of this claimed bias, Cruz alleges that Juror 8 "admitted he was very upset the dead baby had the same name as his great granddaughter." According to Cruz, the fact "[t]hat Juror No. 8 could not get a grip on his emotional response to a regrettable coincidence could only bias him against appellant." Cruz concludes that "Juror No. 8 was unable to separate the victim Alanna from his great-granddaughter Alanna."

There is simply no support in the record for Cruz's contention that Juror 8 could not separate the victim from his own great-granddaughter, and the trial court specifically found that Juror 8 had not personalized the situation. Other than the fact that Juror 8 became slightly emotional when discussing his own great-granddaughter, Cruz offers

nothing that demonstrates that Juror 8 harbored any bias toward him. Juror 8 stated that he could be fair and impartial, and nothing about the circumstances suggests otherwise. Further, the fact that the jury found Cruz not guilty of some of the charged crimes, including torture, undercuts Cruz's assertion that Juror 8 was biased against him.

- d. *The jury was not "tainted" by the cumulative effect of the misconduct of Jurors 3 and 6, and/or by Juror 8's purported bias*

Cruz asserts that the cumulative effect of the various alleged incidents of juror misconduct was a jury that was biased against him. Cruz appears to be arguing that the fact that a number of jurors prevented Juror 3 and Juror 6 from discussing their outside research somehow adversely affected the impartiality of the jury. According to Cruz, "the misconduct and replacement of two jurors told the remaining members of the panel that any mistaken comment could result in the offending speaker being excused." The panel, he contends, "united against Juror No. 6, and then turned on Juror No. 3." He also contends that Juror 8 "sat in silence, overcome by emotion," and that together with Jurors 3 and 6, he created a biased jury.

Again, there is simply no evidence in the record to support Cruz's imagined version of how Juror 8 conducted himself in the jury room. Cruz's contention that Juror 8 somehow negatively affected the jury as a whole is without support. Further, Cruz appears to criticize the jury members for following the court's instructions with regard to outside research. He suggests that the fact that certain jurors prevented Jurors 3 and 6 from discussing their outside research meant that the jury would not tolerate "mistaken comment[s]." However, the jury was not discouraging "mistaken comment[s]," but,

rather, was simply following the instructions of the court by preventing the disclosure of information that the court had expressly prohibited it from considering. There is no reason to believe that this jury's impartiality was in any way negatively affected by the fact that two jurors who independently failed to follow the court's instructions were replaced. We therefore reject Cruz's contention that the trial court erred in failing to declare a mistrial on the ground that the jury was somehow "tainted" by the conduct of the dismissed jurors and Juror 8's purported misconduct.

C. *The trial court did not err in denying Cruz's motion for a new trial*

Cruz contends that the trial court abused its discretion in denying his motion for a new trial. According to Cruz, he was entitled to a new trial on the grounds of newly discovered evidence and on what he alleges was "misconduct" on the part of Juror 8. We conclude that the trial court did not abuse its discretion in denying Cruz's motion for a new trial on these grounds.

1. *Newly discovered evidence*

Cruz contends that the trial court abused its discretion in denying his motion for a new trial based on newly discovered evidence in the form of a surrebuttal expert's testimony. Cruz argued that he had secured the services of Dr. S. Robert Hurwitz, a radiology expert, after the prosecutor had announced that he intended to call Dr. Zouros as a rebuttal witness. Dr. Hurwitz had been unavailable to testify until May 9, and had

not summarized his findings for Cruz until May 22.⁷ Under section 1181, subdivision 8, a defendant may be granted a new trial based on newly discovered evidence.⁸

The trial court has broad discretion with respect to whether to grant a motion for a new trial. (*People v. Delgado* (1993) 5 Cal.4th 312, 328 [""The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."" [Citations.]]).) "In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."" [Citations.]" (*Ibid.*)

While the trial court agreed with Cruz's assertion that he could not have obtained Dr. Hurwitz's surrebuttal testimony in time to present it at trial, the court also determined that a different result was not probable on retrial. We conclude that the trial court did not abuse its discretion in determining that there was no probability of a different result if Cruz were able to present Dr. Hurwitz's testimony.

⁷ The trial court determined that Cruz could not have obtained this testimony in time to present it at trial.

⁸ Section 1181, subdivision (8) provides that a court may grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at trial."

Cruz contends that Dr. Hurwitz's proposed testimony would have bolstered the defense theory of the case that Alanna had been injured sometime before the night she was left in Cruz's care, and that she suffered from a chronic brain injury, rather than an acute one. Cruz argues on appeal that without evidence of a chronic injury, "Dr. Ophoven's views were meaningless, and appellant's explanation of events lost any medical foundation." "Dr. Hurwitz restored the basis for the defense theory of the case," because he "confirmed the presence of a chronic subdural hematoma" and "described the acute bleed as minute, and a common occurrence when there is a dominant chronic subdural hematoma."

This proposed surrebuttal evidence was similar to Dr. Ophoven's testimony that Alanna's brain injuries appeared to have been the result of a chronic subdural hematoma, which was exacerbated by an accidental fall down the stairs. As the trial court noted, however, the jury had rejected Dr. Ophoven's opinions. The court did not believe that the jury rejected Dr. Ophoven's opinions due to Dr. Zouros's rebuttal testimony, but, rather, because Dr. Ophoven had dismissed or ignored other evidence of Alanna's acute subdural hematoma, such as Alanna's extensive retinal hemorrhaging, which other experts opined would have been immediately apparent. Dr. Zouros did not address this issue in rebuttal, and Dr. Hurwitz's proposed testimony would not have touched on this evidence, either. In fact, neither Dr. Ophoven's testimony, nor Dr. Hurwitz's proffered testimony, provided any explanation as to how Alanna could have functioned normally for days, displaying no sign of the extensive injuries that were present at the time she was admitted to the hospital, if she had in fact been injured prior to being left in Cruz's care. Moreover, there

was strong evidence of Cruz's guilt, including the fact that Cruz gave police multiple different versions of what had happened that night, failed to tell Amanda about Alanna's condition, and failed to call 911 or take Alanna to the hospital.

We agree with the trial court that it is not probable that Cruz's proposed surrebuttal evidence, if presented to the jury, would have changed the outcome of this case. We therefore conclude that the trial court did not abuse its discretion in denying Cruz's motion for a new trial.

2. *Alleged misconduct by Juror 8*

Cruz contends that the trial court abused its discretion in denying his motion for a new trial based on Juror 8's alleged misconduct. Cruz argues that "Juror No. 8 was a source of multiple problems," which, Cruz contends, included Juror 8's concealment of material information during voir dire, Juror 8's bias against Cruz, and Juror 8's failure to participate in jury deliberations. Cruz argues that these problems entitle him to a new trial. As we have already concluded, none of Cruz's contentions regarding Juror 8's alleged problems have merit.

As discussed above, Juror 8 did not conceal material information during voir dire, and there is no evidence that Juror 8 was biased against Cruz or failed to participate in jury deliberations. The trial court found that Juror 8 participated in deliberations. That finding is supported by Juror 8's statements that he was deliberating and that he could continue to deliberate. There is nothing in this record to indicate that Juror 8 refused to speak, that he did not listen to other jurors, that he expressed a fixed conclusion, that he

physically separated himself from other jurors, or that he engaged in any other conduct that would indicate that he refused to deliberate.

In opposition to Cruz's motion for a new trial, the prosecutor submitted the declaration of Juror 5, who served as the jury's foreperson. Juror 5 provided the following information: "Juror [N]umber 8 participated in jury deliberations. The only personal information he shared with the rest of the jury was that he had a daughter named Angela and a granddaughter named Alanna, which made it difficult for him to look at the photos submitted to the jury. As far as I can remember, [J]uror [N]umber 8 did look at the photos and participated in deliberations." Cruz contends that the trial court's decision to admit Juror 5's declaration was erroneous because Juror 5's statements constitute conclusions rather than a description of "events inside or outside the jury room." However, the trial court's findings regarding Juror 8's participation are supported by substantial evidence, apart from Juror 5's declaration. The trial court questioned Juror 8, who essentially stated that he was, in fact, participating, and would continue to participate, in the jury deliberations. We therefore reject Cruz's contention that the trial court should have granted a new trial "based upon the misconduct of Juror No. 8."

D. *There is no cumulative error*

Cruz contends that to the extent that none of the individual errors merits reversal, the cumulative error doctrine requires reversal of the judgment.

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) We have concluded that all but one of Cruz's asserted claims of error

are without merit. We have further concluded the single assumed error that the trial court may have committed does not require reversal. There is thus no cumulative error on which to base a reversal of the judgment against Cruz.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.